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Dora B. Goddard and John A. Bundy v. Lovina R. Bundy : Brief of Appellant

Utah Supreme Court

Thatcher & Young; Attorneys for Appellants;

CASE NO. 7540

In the Supreme Court of the State of Utah

In the matter of the Estate of ORA BUNDY,
Deceased.

DORA B. GODDARD and JOHN A. BUNDY,
Appellants,

vs.

LOVINA R. BUNDY, as Administratrix and Personally,
Respondent.

Appellant's Brief

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TABLE OF CONTENTS

AUTHORITIES CITED

Court Decisions

Statutes and Rules Cited

Texts and Legal Encyclopedias Cited

Page

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STATEMENT OF FACTS

This is an appeal by Dora B. Goddard and John A. Bundy, children and heirs at law of Ora Bundy, deceased, from the decree of distribution of the lower court overruling their objections to the final account and petition of the administratrix, and excluding the appellant John A. Bundy from participation in the final distribution. Appellants have also appealed from the order of the lower court refusing to relieve them of their default and to permit them to file out of time their motions for amendment of the findings and decree and for a new trial.

The respondent, Lovina R. Bundy, is the widow of the decedent, and acted as administratrix of his estate. She is the step-mother of the appellants.

Appellants' objections were to a credit of $10,600 claimed by respondent for family allowance paid herself during a protracted administration, to the respondent's failure to inventory and account for certain property, particularly furniture of the estate, and to payment of compensation to respondent administratrix, appellants claiming respondent had waived the same, and further, has forfeited the right to compensation by misconduct in office in connection with the other matters involved.

The appellant John A. Bundy was excluded from final distribution on the lower court's own motion, and this action also is here involved.

The foregoing brief statement of the issues is intended to be merely preliminary and for purposes of orientation.

In this statement, for convenience, the files of the lower court embracing the petitions, pleadings, orders, inventories, accounts, etc., filed with the clerk will be referred to as the "Record" (R), and the transcript of the testimony on the hearing of appellants' objections to the account will be referred to as the "Transcript" (Tr.), and the transcript of the testimony (filed herein July 11, 1950) of John A. Bundy on the return on August 8, 1949, of the citation issued to him will be referred to as the "Supplemental Transcript," (S Tr.).

Ora Bundy died intestate on June 12, 1946, leaving him surviving his widow, the respondent, and his two children by a former marriage, the appellants herein. (R 001, 002)

Mrs. Bundy first appeared on the scene as a housekeeper, three or four years before her marriage. (Tr. 2)

At the time of the marriage of decedent and respond-

ent on November 26, 1926, the appellants were children of tender years. Thereafter and until the marriage of appellants they and their father and step-mother maintained an ordinary family relationship, (Tr. 12, 21, 27), although the daughter, Dora Goddard, felt some hesitation about questioning the activities of her stepmother after her father's death. (Tr. 21) Dora reposed confidence in her step-mother to look after her interests. (Tr. 21)

At the time of his death Ora Bundy was in the contracting business in partnership with his wife and two children. He owned a 35% interest, Mrs. Bundy a 25% interest, and the two children 20% each. (Objectors Ex. 7, Tr. 89)

Lovina Bundy testified that she brought to this marriage some furniture, some personal things, and nine shares of Davis & Weber Counties Canal Co. stock worth about $1260 on her own estimate. (Tr. 52 and 2) Her father left her about $3000, but this was mostly used up before Bundy's death. (Tr. 52)

During the period of her marriage to Mr. Bundy the respondent was never gainfully employed. (Tr. 51) And yet at the time of Mr. Bundy's death she had, or acquired by right of survivorship of him separate property as follows:

Item	*Probable Value*
9 shares stock of Davis & Weber Counties Canal Co.	$1260.00
Life Insurance on decedent's life, payable $87.50 semi-annually	5000.00
U. S. War Savings Bonds (Series E)	4916.00
U. S. Bonds,, Series G	1000.00
W. O .W. Life Insurance on decedent's life	1017.30
Family Home at 1432 25th Street, Ogden, Utah, sold 15 months later for	17900.00
Savings account	300.00
Checking account	"not large"
25% interest on Ora Bundy & Co., a co-partnership (realized, at date of trial, approximately)	9548.00
Total	$40,941.30

(Tr. 2-4, 109-110)

Then, on August 27, 1947, in partial distribution of the estate, the respondent received $10,000 in cash together with a 10 foot strip of land which constituted a part of the lot on which the family home was situate. (R 096-097, 161)

During the period of the Bundy marriage, Mr. Bundy paid all the bills except a few small purchases of odds and ends of furniture, dishes, etc., which Mrs. Bundy testified she purchased out of her own money. (Tr. 12-13, 51-53) But at the time of his death there

was in the family home a substantial amount of furniture paid for directly by Mr. Bundy. (Tr. 54, 14-18) The efforts of counsel for appellants to question Mrs. Bundy and Mrs. Goddard as to the identity of this property (which was never inventoried by respondent) were defeated by rulings of the court, entered in part on the court's own motion, excluding the evidence and instructing the witness not to answer. (Tr. 13-18, 53-54)

Moreover, there was in decedent's house in Brigham City (occupied by John Bundy, decedent's son) at the date of death a quantity of furniture which "Jack" claimed as a gift from his father. Jack's claim was disputed by Mrs. Bundy, who dispossessed the son, sold part of the furniture (accounting to the estate for the proceeds) and appropriated the rest to her own use. At the time of the trial this furniture was in use in the home Mrs. Bundy purchased for herself after the partial distribution in August, 1947. This furniture was never inventoried, appraised, or accounted for although she testified she intended to have it distributed to her and charged against her share of the estate. (Tr. 77-80) It was not so charged. (R 222)

Objectors offered in evidence a copy (the "best evidence" rule being waived) of Decedent's intended last will and testament signed by him less than a month before his death, by paragraph 2 of which he assumed to dispose of "The home at 1432 25th Street in Ogden, Utah, *together with all furnishings* (except the grand piano which belongs to Dora B. Goddard)" as his own property. This was offered to prove Decedent's intent and state of mind regarding his ownership of the furniture, etc. The Court, however, rejected the offer. (Tr. 7-9) (Italics supplied.)

It is interesting to note that Mr. Bundy, by paragraph 7 of this document, also attempted to dispose of the "Property" at 531 So. 5th East Street, Brigham City, as his own.

Immediately after the death of the decedent, the heirs had a conference at the family home. Dora Goddard made some suggestions regarding counsel to be retained, but Mrs. Bundy "insisted" that Mr. Holther be called in, and that was done. (Tr. 6, 25) He explained that Mr. Goddard (Dora's husband) could not act as co-administrator because of his non-residence and suggested that Mrs. Bundy act, advising that the administratrix would be under his guidance and would follow his advice. Dora and Jack then signed a written consent that Mrs. Bundy be appointed administratrix, specifically waiving her ineligibility by reason of her being a surviving partner of the decedent. (Apparently this was prepared by Mr. Holther.) Dora does not recall any mention made, or discussion had, regarding this statutory ineligibility. (Tr. 9-10, 25-26, 38-39) This document was never filed with the court, the petition being based on respondent's right as surviving wife, without mention of the partnership relation.

At the hearing, appellants offered to prove that Mrs. Bundy, at the time they consented to her appointment, orally waived any claim for an administratrix fee, but that was excluded by the court as not being within the issues drawn. Appellants' motion for leave to amend to present the issue was denied by the court, and the testimony, admitted pro-forma, was stricken. (Tr. 10-11)

Letters of Administration were issued to respondent on her petition on July 8, 1946.

On October 10, 1946, respondent paid to herself out of the funds of the estate, $1000 as an "advance". On December 30, 1946, she similarly paid to herself $1500, and on April 12, 1947, $3300, as "family allowance." (R 081)

Two weeks *after* this third payment, on April 29, 1947, she filed her verified petition for a family allowance. (R 033-035) Omitting the formal parts, the petition reads as follows:

"TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT"

Your petitioner, Lovina R. Bundy, respectfully represents and shows:

I

That Ora Bundy died intestate on the 12th day of June, 1946; that this honorable Court, after proceedings duly and regularly had herein, on the 8th day of July, 1946, appointed your petitioner Administratrix of the estate of said decedent; that your petitioner thereafter, and on said same day, duly qualified as such Administratrix and Letters of Administration were duly issued to her, and ever since that date your petitioner has been and now is the duly appointed, qualified and acting Administratrix of the Estate of the above named Ora Bundy, deceased.

II

That your petitioner is the surviving wife of said decedent, and she, together with John A. Bundy and Dora Goddard, are the sole and only heirs at law of said decedent; that all of said heirs at law are of legal age.

III

That the estate of said decedent is solvent.

IV

That your petitioner has caused due notice to creditors to be given for the time and in the manner required by law, and this Court on the 26th day of November, 1946, made and entered its Decree showing that due and legal notice to creditors has been given.

V

That all creditors claims presented have been allowed and paid, and all of the expenses of the last illness and burial of said decedent, together with taxes upon the real and personal property of the estate, and the accrued costs of probate have been paid; that the inheritance taxes have not yet been determined and fixed.

VI

That your petitioner is entitled, as the surviving wife, for such allowance for her maintenance and support as is reasonable under all circumstances to be paid to her for the period commencing with the date of the death of said decedent on June 12, 1946, and continuing during the pendency of the administration of this estate; and your petitioner verily believes, and so states the fact to be, that such reasonable allowance is $300.00 per month.

WHEREFORE, your petitioner prays that upon hearing after notice duly given this honorable Court make its order allowing and awarding the sum of $300.00 per month for her support and maintenance during the administration of said estate, and for such other and further order as may be meet and proper in the premises.

/s/ Lovina R. Bundy
PETITIONER

/s/ David K. Holther
ATTORNEY FOR PETITIONER

Notice of hearing on "the petition Lovina R. Bundy, praying for an order fixing and allowing of family allowance" was given by mailing and posting notices. (R 036-037) As appears from the files, both of appellants have lived out of Weber County throughout the administration.

Because of the confidence they reposed in their stepmother, the administratrix, and her counsel (Tr. 20-22), appellants did not attempt to press actively to determine their rights or to supervise the administration of the estate. They expected a family allowance to be made. (Tr 32-33) Under these circumstances they made no appearance in respect to the petition for family allowance, and so on May 12, 1947, eleven months after decedent's death, the pettition was granted, and the court

> "....ORDERED that there be allowed and paid to said widow, Lovina R. Bundy, for her support and maintenance the sum of $300.00 per month, beginning on the 12th day of June, 1946, and continuing until the further order of the Court."

(R 042)

At that time no inventory had been filed. It was not filed until June 21, 1947. (R 056-065) Nor did Mrs. Bundy, either personally or as administratrix, disclose to the court or to the heirs the fact that she had separately owned resources worth $40,900—more than half the value of the entire estate as subsequently appraised.

It appears that the bulk of the assets in the partnership, Ora Bundy and Co., were liquidated in the partnership with ease and expedition, for on February 30 (?), 1947, the partnership paid the estate, on account

of loans and advancements, $36,500, and on June 1, 1947, there was $36,439.57 in cash in the partnership bank account to pay the balance of partnership obligations and to pay a liquidating dividend. (Tr 89, Objectors Exh. 7) The partnership obligations were discharged and the dividend paid on or about June 16, 1947. (Ibid. and R 080) Mrs. Bundy received $5,282.12 *in addition to* an advance of $2000 she had previously made to herself. (Ibid.) It should be observed, however, that on June 21, 1947, she made a "Refund" of $1500 to the estate.

Then, as hereinbefore stated, on August 27, 1947, Mrs. Bundy received $10,000 in cash upon a partial distribution of the estate. (R 161)

Mrs. Bundy paid herslf, during administration, family allowance at the rate of $300 per month from the date of decedent's death on June 12, 1946, until May 22, 1949, six days after filing her final account, a total of $10,600 in addition to her other assets. (R 154)

It was stipulated that within 15 months after decedent's death the estate had on hand sufficient money to pay all debts, costs and expenses of administration. (Tr 4) Respondent's first account, verified August 13, 1947, shows cash receipts of $69,000, and disbursements of less than $18,000 (R 080-082), with a cash balance in excess of $51,000.

As early as June 9, 1947, counsel for the respondent wrote the heirs that if taxes payable by the estate are "definitely determined soon, then I will likely recommend *final* distribution rather than a partial distribution, and have those assets which we are finding

difficult to liquidate distributed in kind, so the estate can be closed and the bond terminated and the work of liquidation of questionable assets can be continued after the close of the estate." (Objectors Exh. 7)

The estate, however, was not closed. The administration was continued, and petition for final distribution was not filed until nearly two years later, on May 16, 1949. (R 153-164)

In the meantime respondent continued her family allowance.

The Utah State Inheritance tax was paid June 10, 1948, just one year later. The Federal Estate tax was not paid until March 1, 1949, although under the law it was due September 12, 1947, and presumably bore interest at 6% from that date as provided by law.

So far as we have been able to find, the respondent has nowhere made or attempted an explanation or excuse for this long delay in paying the taxes due, which counsel indicated was the only reason for delaying final distribution. Her only explanation for delay in closing the estate was that an agreement as to the manner of distribution could not be reached (Tr 80) and that because she feared a lawsuit concerning certain *partnership* dealing with one Holmes. (Tr 101-102, 93-95) The Holmes deal was financed by the partnership (Tr 95) and hence was a partnership venture.

There is nothing in the record to show that the situation in May of 1949 when respondent asked for distribution was substanially different from the situation obtaining when partial distribution was had in 1947. Two or three additional items had been sold in the

two year period, and the partnership had paid the estate an additional liquidating dividend of some $2400, *but there were still on hand a number of unliquidated items of substantial value, both in the estate and in the partnership.* (R 160-164, Tr. 73-74) These were, on April 29, 1950, in fact distributed in kind as contemplated by counsel's suggestion of June 9, 1947. (R 220-225) No reason has been given by the respondent as to why this could not have been done in the first place.

Dora Goddard did not know the amount of the family allowance until January of 1948, an earlier inquiry having failed to get that information. (Tr 18-19) She assumed it would be automatically discontinued when distribution was made. (Tr 19) In August of 1948 she learned for the first time that the administratrix was continuing to pay herself family allowance.

Perceiving that this was depleting her share and her brother's share of the estate, she began to urge the early closing of the estate. (Tr 20) On September 3, 1948 she wrote counsel for the administratrix as follows:

> "Am wondering what's transpiring. The time element thus far involved would certainly seem adequate I should imagine. Should appreciate having some word from either of you. Meanwhile the estate must be dwindling at least as far as sustenance goes."

(Tr 20, Objectors Exhibit 2)

Dora did not earlier press for a closing of the estate because she relied on Mr. Holther to handle things properly, and had confidence that Mrs. Bundy would do

the right thing. She also felt some delicacy in pressing for her legal rights because of the family relationship. (Tr 20-23)

Begining as early as April 19, 1948, there had been some negotiation among the heirs with a view to carrying out the wishes of the decedent as expressed by him in a will invalid because of improper execution. (Exhibit 1) On December 5, 1948, Dora wrote Mr. Holther reviewing this negotiation, pointing out that the delay was not Dora's and advising that she and Jack would settle the matter either by following her father's wishes, "or by settling the estate immediately under the Law of Succession." She added, "I have been wondering about the statute of limitations on widow's allowance, and on the debts owed the estate. What is the law in Utah regarding these two points." (Tr 21-24)

The family allowance nevertheless continued.

Then, on April 30, 1949, Mr. Holther mailed to the three heirs a proposal for distribution with proposed adjustments. (Adm. Exhibit B, Tr 36-37) The letter was introduced in evidence by respondent. It proposed that real estate previously distributed to Mrs. Bundy referred to in the proposal at "Property No. 1" be charged against her share at a value of $450. In view of the fact that this land adjoined the tract standing in her name, and was part of the "home lot" which she subsequently sold, with the improvements, for $17,900, this seemed only fair to appellants. They were satisfied with this part of the proposal and indeed did not apprehend that the charge would not be made as proposed, even though the court appraisal was for only

$100, and the inheritance tax appraisal was $250. Because of this proposal no issue was tendered by them on the valuation thereof for purposes of distribution.

It is to be observed that this last proposal still included some beneficiaries other than the heirs at law.

On May 13, 1949, Mr. Holther sent to the heirs a copy of the Final Account and Petition for Final Distribution. (Tr 35-36, Adm. Exhibit A) In the covering lettering the adjustment of inventory values for purposes of distribution was discussed, and it was stated that in the absence of an agreement among the heirs the court would give each heir one-third of each kind of property, deducting the advances to Jack "and deducting *the value* of the ten foot strip of land to Mrs. Bundy." (Adm. Exh. A p. 2) (Italics supplied)

Upon receipts of this communication, Dora Goddard, who had never received a copy of the first account (Tr 38, 42), wired for and received from Mr. Holther a copy thereof. (Tr 42-43, Obj. Exh. 6, Adm. Exh. C)

After studing the accountings, Dora retained counsel, and on May 30, 1949, she wrote Mr. Holther the letter, Objectors Exhibit 5. (Tr 37) In that letter, among other things, she said:

> "In reviewing the papers, we noted that Lovina has applied for the family allowance right up to the last day and we were surprised that some sort of an adjustment hadn't been made in view of the fact that there has certainly been unnecessary delay in settling the estate. Also, the partial distribution gave her financial relief which in itself would have some bearing on the con-

tinuance of the family allowance. We all know that the estate could have been easily closed much sooner, and the fact that it has been held up for three years does not appear to justify a full allowance for the entire period. As our knowledge of estate legal proceedings is of course limited, I wrote you on December 4, 1948, and asked what limitations there were on the family allowance, and debts owed the estate. I received no reply to this letter."

In that letter she also noted the proposal to charge Lovina $450 for the property distributed to her and sold as a part of her home, and she outlined briefly her efforts to obtain, and respondent's resistence to an early distribution. It is apparent that Mr. Holther had for some time been trying to bring his client into agreement with the other heirs as to some extra-legal distribution, but that she changed her mind each time that agreement seemed imminent, and so delayed distribution. (Tr. 48-50)

Upon being retained, counsel for appellants sought for and obtained an order continuing the hearing on respondent's account and petition to June 27, 1949, and authorizing the filing of formal objections in the meantime. (R 168-169)

On June 27, 1949, the matter was continued to July 5th, and on July 5th, was continued to July 26, 1949, for hearing.

On July 8, 1949, appellants filed their OBJECTIONS TO ACCOUNTS OF ADMINISTRATRIX, AND CROSS PETITION. (R 173-180) Omitting the formal parts, that pleading reads as follows:

"Come now John A. Bundy and Dora B. Goddard, son and daughter respectively of the above named decedent, and contest and object to the allowance of the second and final account and report and petition for final distribution of Lovina R. Bundy, as administratrix of the estate of Ora Bundy, deseased, filed herein on the 16th day of May, 1949, and for causes of contest and objections and for cross-petition against her allege as follows:

1. The contestants and objectors are the only children of the decedent Ora Bundy and with the surviving widow, Lovina R. Bundy, are the sole heirs-at-law of said decedent. The said Lovina R. Bundy is and at all times herein mentioned was the stepmother of the contestants and the surviving widow of the decedent. As such surviving widow her personal interests are, and at all times during the administration of the estate of said decedent they have been in conflict with her duties as administratrix of the estate of said decedent as will hereinafter more particularly appear.

2.The final account filed by said administratrix is incorrect in the following particulars, to-wit: A. By said accounting, to which reference is hereby made, the said administratrix claims credit for family allowance in the sum of $10,600.00 paid to herself as surviving widow of the decedent during the term covered by said accounting and said expenditure for the reasons hereinafter alleged is not proper, is not authorized in law and is excessive and unreasonable.

B. By said accounting and petition the said administratrix seeks to be allowed commissions as compensation for services as administratrix of the estate of said decedent in the sum of One

Thousand Seven Hundred Thirty Six and 56/100 Dollars ($1,736.56), the granting of which contestants object to for the reason that said administratrix is not entitled to the same or any part therof and for the further reason that the same is excessive because said administratrix has not faithfully discharged her trust in the manner required by law and has not earned said commissions and by her violations of duty imposed by law and by improper expenditures she has forefeited all right to said compensation and comcommission all as is hereinafter more particularly alleged.

3. The said administratrix after proceedings duly and regularly had in the above entitle matter was on the 8th day of July, 1946, duly appointed administratrix of the estate of Ora Bundy, the above named decedent, and she thereupon qualified as such administratrix and letters of administration issued to her and thence hitherto she has been and now is the duly qualified and acting administratrix of said estate.

4. The said Lovina R. Bundy as the surviving wife of the decedent and as the administratrix of his estate, filed herein, on the 29th day of April, 1947, her petition for family allowance to herself as such widow in the sum of Three Hundred and 00/100 Dollars ($300.00 per month alleging that such allowance was reasonable to be paid her for the period commencing with the date of the death of decedent on June 12, 1946, and continuing during the pendency of the administration of said estate. The said petition for family allowance does not state facts sufficient to entitle the said Lovina R. Bundy to the family allowance prayed for therein or any sum whatever.

5. The said administratrix in the discharge of her trust was then and there under the duty to oppose the granting of any unnecessary or unreasonable family allowance except homestead rights and pursuant thereto was then and there under the further duty of reporting to this court any and all separate property or income owned or possessed by her.

6. At the time of the death of said decedent and at all times thence hitherto the said Lovina R. Bundy had and she now has separate property and income of great and substantial value. The said property and income at the time of his death consisted of a residential property used by her as a home of the probable vlue in excess of Eight Thousand Five Hundred and 00/100 Dollars ($8,-500.00), United States Series E Bonds and United States Series G. Bonds in the joint names of said Lovina R. Bundy and of decedent of the value of $5,915.50, an interest in the co-partnership of Ora Bundy and Company of the fair value of Eleven Thousand and 00/100 Dollars ($11,000.00) and of miscellaneous death claims upon policies of life insurance upon the life of said decedent designating her as sole beneficiary, the total amount of which is unknown to the contestants but which they are imformed and believe and therefore allege to be a very large sum. In addition thereto as contestants are informed and believe and therefore state the fact to be the said Lovina R. Bundy was at the time of the death of said decedent, the owner and in possession of other real and personal property of a great and substantial value, the exact amount of which is not known to these contestants.

7. Notwithstanding the said duties and in violation thereof and in violation of the duties of her

said trust as administratrix the said Lovina R. Bundy failed and neglected to report to the court at the time of the filing of said petition or at the hearing thereon or at any time thereafter the existance or the value of any of the said property or income and by the said violation of her said duties and by her failure to disclose and report to the court the existance and value of the said property and income she procured the court on the 12th day of May, 1947, to make and enter an order for family allowance allowing to said Lovina R. Bundy as widow of the decedent, for her support and maintenance the sum of Three Hundred and 00/100 Dollars ($300.00) per month beginning on the 12th day of June, 1946 and continuing until the further order of the court. As contestants are informed and believe and therefore state the fact to be the said order was inadvertently made by the court without knowledge of any of the said property or income of said widow and said order would not have been made had the said administratrix in compliance with her said duties reported to and informed the court of her said separate property and income.

8. Pursuant to the said order the said Lovina R. Bundy has paid to herself the entire amount of family allowance accruing under the said order so inadvertently made amounting in all to the sum of $10,600.00, all as shown by the first account, and the said second and final account of said administratrix on file herein to which reference is hereby made, and the said Lovina R. Bundy personally has thereby profited by her breach of duty and her breach of trust and it would be unjust and improper to allow her to retain the family allowance so paid to her out of the property of the estate of said decedent.

9. Thereafter and on the 27th day of August, 1947, the said Lovina R. Bundy as the widow and heir of the decedent acquired as her further separate property the sum of Ten Thousand and 00/100 Dollars ($10,000.00) in money by a partial distribution of the property of this estate pursuant to the order for partial distribution made and entered herein on said day. By reason of the receipt of the said money as aforesaid it thereupon became unnecessary and unreasonable, if it had ever been necessary or reasonable, for the said Lovina R. Bundy to receive or to be paid any further family allowance out of the estate of said decedent. It thereupon became and it was and ever since then it has been the duty of the said Lovina R. Bundy as administratrix of said estate in the performance of her trust and for the purpose of preserving the assets of said estate for those beneficially interested therein to report to and call to the attention of the court the fact of her acquisition and receipt of said money upon the partial distribution and the fact that it was no longer necessary or reasonable, if it had ever been necessary or reasonable, for a family allowance to be paid to her as widow of said decedent in the sum of Three Hundred and 00/100 Dollars ($300.00) per month or in any other sum. It thereupon became and was and ever since has been the further duty of said administratrix as it had been her duty from the first to discontinue paying to herself as widow of said decedent the sum of Three Hundred and 00/100 Dollars ($300.00) per month or in any other sum as family allowance.

10. Notwithstanding the duties aforesaid of said administratrix and in violation thereof and in violation of her trust as such administratrix said Lovina R. Bundy failed and neglected to

report or to call to the attention of the court the fact of her receipt of the said Ten Thousand and 00/100 Dollars ($10,000.00) or the fact that it was no longer reasonable or necessary that she pay to herself as widow of the decedent any family allowance, and failed and neglected to discontinue paying to herself family allowances as aforesaid, but on the contrary she continued in violation of her said duties and her said trust to pay to herself family allowance in the sum of Three Hundred and 00/100 Dollars ($300.00) per month until the filing of the final account herein. By reason of the facts aforesaid the said Lovina R. Bundy has unjustly enriched herself at the expense of the trust estate in the sum of $10,600.00 and it would be unjust and improper for this court to permit said Lovina R. Bundy to retain said moneys or to claim credit upon her said accounting for the payment thereof or of any part thereof.

11. As contestants are informed and believe and therefore state the fact to be, this court, if the said facts had been reported to it or called to its attention, would have cancelled and terminated the order for family allowance theretofore procured by Lovina R. Bundy as aforesaid and would have ordered that no further payments of family allowance be made.

12. By reason of the failure of the said Lovina R. Bundy as administratrix to report or call to the attention of the court the facts aforesaid she imposed upon the court and these objectors all of whom are and have been entitled to repose trust and confidence in her as such administratrix and as the stepmother of these objectors, and she thereby wrongfully procured the continuance in effect of the order for family allowance and benefited thereby at the expense of her trust.

13. The time for presentation of creditors' claims to said administratrix expired on the 11th day of November, 1946. By March 1, 1947, there were ample funds in the hands of the administratrix for the payment of all debts due by the estate. By the exercise of reasonable diligence or of any diligence at all the said administratrix would have been able to complete the administration of said estate, file her final accounts, procure an order of final distribution and distribute the estate not later than September 12, 1947, fifteen (15) months after the date of the death of the decedent, and it was the duty of the said administratrix to bring such administration to a close and settle her accounts and distribute said estate among the heirs of the decedent not later than said date. It was for the benefit and advantage of said Lovina R. Bundy personally to prolong the administration of the said estate and to continue to receive family allowance during the prolonged administration thereof.

14. Notwithstanding the duties of said administratrix and in violation thereof said administratrix failed and neglected to exercise reasonable diligence or any diligence in and about the administration of said estate or to bring the administration thereof to a close and procure distribution, but on the contrary in violation of her said trust and of her said duties and to her own personal profit and benefit the said administratrix purposely delayed and prolonged the administration of said estate beyond the said 12th day of September, 1947, and beyond any reasonable time for the completion of such administration for the purpose, as the objectors are informed and believe and therefore state the fact

to be of profiting at the expense of her said trust by the continuation of the payment to her of family allowance as aforesaid.

15. As objectors are informed and believe and therefore state the fact to be the said administratrix Lovina R. Bundy has not performed the work and services incident to her office and the administration of the estate of said decedent but said work and services have been performed by counsel for the administratrix for which compensation has been claimed and will be paid out of the assets of said estate and by accountants employed by said administratrix and paid out of the assets of said estate.

WHEREFORE, objectors and contestants pray that said account of the administratrix Lovina R. Bundy be rejected and that said administratrix be required to render a true account of her administration within a reasonable time fixed by the court and that the court adjudge and declare that said administratrix is not entitled to any credit for family allowance paid to herself as widow of the decedent out of decedent's estate and that said administratrix is not entitled to receive any commission or compensation for services as administratrix in the administration of said estate or otherwise and that the court charge said administratrix with all sums heretofore paid by her to herself as family allowance as the widow of said decedent and order and require the said administratrix to refund to the estate of the decedent all sums so paid with interest thereon at six per cent (6%) per annum from the dates of the payments thereof and the contestants and objectors have judgment against the administratrix for their costs of court herein.

Objectors and contestants pray for such other and further relief as may be just and equitable in the premises.

/s/ Thatcher & Young
Attorneys for Contestants
and Objectors

Through inadvertance, a copy thereof was not delivered to Mr. Holther until July 21, 1949.

On July 28, 1949, respondent filed her MOTION AND NOTICE OF MOTION TO STRIKE the Objections, and her general DEMURRER thereto. (R 184-185)

Omitting the formal parts, the Motion is as follows:

"TO JOHN A. BUNDY AND DORA B. GODDARD, Contestants and Objectors, and to THATCHER & YOUNG, Esqs., their attorneys:

You and each of you will please take notice and you are hereby notified that on Tuesday the 26th day of July, 1949, at the hour of 2:00 o'clock P. M. of said day or as soon thereafter as counsel can be heard, in the above entitled Court, in the Court Room of Department No. 1, thereof, in the Municipal Building in Ogden City, Weber County, Utah, Lovina R. Bundy, the Administratrix herein, will and she does hereby move the above entitled Court to strike from the files and records of the above entitled matter that certain instrument denominated "Objections to Accounts of Administratrix and Cross-Petition" filed herein the 8th day of July, 1949, upon the grounds and for the reason that:

1. The same was not served upon counsel for the Administratrix of the above entitled estate within the time allowed by law and the time allowed by the Court therefor.

Said motion will be made and based on this notice of motion and upon the pleadings, papers, records and files in this action.

Dated this 23rd day of July, 1949.

/s/ David K. Holther
ATTORNEY FOR ADMINISTRATRIX

Service acknowledged and copy hereof received this 26th day of July, 1949.

THATCHER & YOUNG
By /s/ Roy D. Thatcher
Attorneys for Contestants and Objectors

The demurrer and motion having been argued and submited, the court made a minute order overruling the demurrer, but striking *certain portions only* of appellants' objections and cross petition. (See the Supplementary Record tendered herewith for filing.) No formal order thereon was ever made or filed, but the minute order the court struck from the objections all of paragraph 2B thereof, and all of paragraphs 4, 5, 6 and 8 thereof. (Ibid.)

On October 3, 1949, respondent filed her ANSWER TO OBJECTIONS TO ACCOUNTS OF ADMINISTRATRIX AND CROSS PETITION. (R 189-191) Omitting formal parts, it is as follows:

"Comes now Lovina R. Bundy, Adinistratrix herein, and answering the Objections to Accounts of Administratrix and Cross Petition, filed herein, as required by the Court, says:

I

Answering the allegations of paragraph 1, thereof, admits the contestants and objectors are the only children of the decedent Ora Bundy, and with the surviving widow, Lovina R. Bundy, are the sole heirs-at-law of said decedent. That said Lovina R. Bundy is and at all times herein mentioned was the step-mother of the contestants and the surviving widow of the decedent.

Denies all other allegations in said paragraph contained.

II

Answering the allegations of parapraph 2A, thereof, admits that by the final account filed by said Administratrix, she claims credit for family allowance in the sum of $10,600.00 paid to herself as surviving widow of the decedent during the term covered by said accounting and from the death of her husband.

Denies all other allegations in said paragraph contained.

III

Answering the allegations of paragraph 3, thereof, admits the allegations therein contained.

IV

Answering the allegations of paragraph 7, thereof, admits the Court, on the 12th of May, 1947, made and entered an order for family allowance allowing to said Lovina R. Bundy, as widow of the decedent, for her support and maintenance, the sum of Three Hundred and 00/100

Dollars ($300.00) per month beginning on the 12th day of June, 1946, and continuing until the further order of the Court.

Denies all other allegations in said paragraph contained.

V

Answering the allegations of paragraph 9, thereof, admits and alleges that on the 27th day of August, 1947, the Court ordered partial distribution of the property of this estate and thereby, and pursuant thereto, $10,000.00 in money was distributed to each of the heirs of this estate.

Denies all other allegations in said paragraph contained.

VI

Answering the allegations of paragraph 10, thereof, denies all allegations in said paragraph contained.

VII

Answering the allegations of paragraph 11, thereof, denies all allegations in said paragraph contained.

VIII

Answering the allegations of paragraph 12, thereof, denies all allegations in said paragraph contained.

IX

Answering the allegations of paragraph 13, thereof, admits the time for presentation of creditors claims to said administratrix expired on the 11th day of November, 1946. By March 1 1947, there were ample funds in the hands of the administratrix for the payment of all debts by the estate.

Denies all other allegations in said paragraph contained.

X

Answering the allegations of paragraph 14, thereto, denies all allegations therein contained.

XI

Answering the allegations of paragraph 15, thereof, denies all allegations therein contained.

WHEREFORE, answering party prays that said Objections to Accounts of Administratrix and Cross Petition be dismissed; and for such other and further relief as is meet in the premises.

/s/ Lovina R. Bundy
ADMINISTRATRIX OF THE ESTATE OF ORA BUNDY, DECEASED

/s/ David K. Holther
ATTORNEY FOR ADMINISTRATRIX

Thereafter, by stipulation, appellants filed an amendment to their Objections and Cross Petition, adding threto an additional paragraph 16, reading as follows:

> "16. The said administratrix has not inventoried or accounted for all of the property of the estate of said decedent and in particular she not inventoried or accounted for certain household furniture, furnishings, equipment and supplies, the property of the decedent Ora Bundy, which the objectors are informed and believe is of great and substantial value, the exact market value thereof not being within the knowledge of the objectors."

By stipulation this was deemed denied by the administratrix. (R 195-196)

The trial was had on the issues so drawn.

However, in the meantime the Honorable John A. Hendricks, the judge before whom the matter was pending, happened to overhear some gossip intimating that that appellant John A. Bundy, an heir and a co-partner in Ora Bundy and Co., was not properly accounting to the partnership for its property and funds in his hands. (S Tr. 21-23) On the Court's own motion a citation was issued requiring him to appear and answer concerning the property of the estate "and property and interests of said estate in Ora Bundy and Co." (R 187-188)

He appeared on August 8, 1949, in answer to the citation, and was extensively cross examined by the Court and by counsel for the administratrix. (See the "Supplemental Transcript") It there appeared that "Jack" had been working actively in the partnership during his father's lifetime, and for a short time following his death continued to be active as a partner in dealing with the property. It appeared that business records were loosely kept, and formal bookkeeping was not the practice in the operations in which he participated. (S Tr 16) However, it was not made to appear that he had received any money or property for which he had not accounted. On the contrary, it affirmatively appeared that on August 10, 1946, there was an account stated in writing between Jack and Mr. Holther and it was found that there was a balance of $862.50 due the partnership, which Jack settled by authorizing this sum to be charged against his 20% share of the partnership assets, which was done. (S Tr. 13-18 Admx. Exh. "A; filed August 8, 1949, following R 187) Mr. Holther, as appears from his correspondence in evidence,

was counsel for the partnership as well as for the estate, and the statement of account of August 10, 1946, is partly in his, and partly in Jask's handwriting. Jack testified postively that he had not received any partnership moneys which had not been "turned in." (S. Tr 18) There is no evidence to contradiate it.

When these circumstances appeared and the Court was unable to give counsel the names of the possible witnesses whose gossip he had heard, the Court stated, in effect, that he would leave further action "up to the estate." (S. Tr 23) No action was taken by the estate.

The issues on appellant's objections and the answer thereto were tried in February, 1950. At the trial the facts were made to appear, as appellants view it, substantially as hereinbefore outlined. On several occasions during the trial the Court made comments to the effect that Jack had, in the Court's opinion, received his full share of the estate by reason of his dealings with the partnership. On one such occasion counsel for respondent made a statement to the Court with respect to that situation which the Reporter unfortunately did not record, apparently regarding it as argument.

Respondent's counsel recalls making the statement, and has been invited to reconstruct it for the record, but has declined, as he feels the matter was too remote in time for him to reconstruct it accurately without taking some time for reflection. He has, however, suggested that the writer be free to state here his recollection, and that counsel would, if his recollection varied, then attempt to restate it in respondent's brief. With some

hesitation the writer follows that suggestion, feeling that the statement is very material in view of the Court's findings.

The writer's recollection is that respondent's counsel stated, in substance and effect, that the problem of Jack' dealings in partnership property and money had from an early time been a matter of much concern to him and to Mrs. Bundy, and that they had diligently pursued the matter through every approach which appeared available; that they had had numerous conferences with Jack on the subject, and had obtained from him the admissions contained in the statement of account introduced in evidence in the hearing on the citation in August of 1949; that they were not satified that Jack had made a full accounting, and, like the Court, believed that he was further indebted to the partnership, but that, in view of the lack of records and their inability to find any other evidence, or any witnesses, they were unable to present legal proof of their suspicions; that the entire matter had been explored at the hearing on the citation, without avail, and that nothing more had been found since then, so that the administratrix was not in a postion to pursue the matter.

At the conclusion of the trial, the matter was taken under advisement, and on April 24, 1950, the Court made and filed his "Memorandum Decree" (R 205-210) deciding every issue in favor of Respondent, and, further, depriving Jack of the balance of his share of the estate, and directing distribution of the entire residue to Mrs. Bundy and Dora in equal shares, after allowing for advancements. Counsel for Respondent promptly prepared formal findings and decree and submitted them

to the Court, without however serving them on adverse Counsel prior to submission. On April 29, 1950, the Court signed and filed the Findings and the Decree. (R. 211-225).

The Court found (Findings, paragraph 3, R. 212):

> "That on the 29th day of May, 1947, she filed herein inventories and appraisements showing all of the estate of said deceased which had come to her knowledge and possession; said inventories and appraisements totalled $81,726.52. That the furniture, furnishings and equipment of the home of the Administratrix and in possession of Lovina R. Bundy, at the time of the death of said decedent, were purchased, in part, by Lovina R. Bundy, with her separate funds acquired by inheritance from her father's estate and accumulated prior to her marriage, and were all joint property, and such did not, and does not, constitute any part of the property of this estate, and was properly, therefore, not inventoried as property of this estate."

The Court, in paragraph 4 of its findings, (R. 212-213) upon the issue of family allowance, found:

> "That on the 12th day of May, 1947, this Court made and entered it's Order for Family Allowance, pursuant to verified petition therefor and after notice and hearing. That the petition therefor was sufficient to satisfy the requirementh of the statute and the sum of $300.00 per month, allowed by said Order, was reasonable and commensurate with the status of the widow, her mode of life in the community, and with the size of the estate and the allowance, and the amount, were the exercise of the sound discretion of the Court. That both of the objectors had due,

legal and sufficient notice of the hearing on said petition, knew what action the Court took thereon, and of the amount the Court granted; and each objector received copies of the first account and report and petition for partial distribution and Dora B. Goddard and her husband, Grant Goddard, an accountant, duly examined such account and knew exactly what sum had been allowed to the widow; that the objectors were in a position to know, and did know, that the family allowance was to be continued to the settlement of the estate.

That Lovina R. Bundy and Ora Bundy, the deceased, were married in 1926, and at that time the objectors, Dora B. Goddard and Jack Bundy, children of the deceased by a prior marriage, were ten and eight years of age, respectively, and were thereafter, raised in the home of Lovina R. Bundy and her now deceased husband, Ora Bundy; that the major portion of decedent's estate was accumulated during the married life of the deceased and his now widow, and at his death the major portion of his estate consisted of his interest in the Ora Bundy & Co.; that in the course of the administration of this estate, the widow did not assert her homestead exemption, nor did she ask for separate compensation for winding up the affairs of the Ora Bundy & Co., partnership, to which she would have been entitled to on a separate action for winding up the affairs of the partnership and her thus handling of such affairs reduced the amount of the attorney's fees and the handling of the affairs of the estate and of the partnership, together, was advantageous to the heirs; that the allowance of, and approval of, the payment of family allowance to the widow up to the time of the filing of

the second and final account by the Administratrix, is within the exercise of the sound discretion of the Court and the Court finds it reasonable to allow and approve such payment as provided in said accounts and reports."

The Court found that the value of the 10 foot strip of land previously distributed to Mrs. Bundy was "as appraised, to-wit, $100.00" (R. 214, paragraph 8), and concluded she should be charged therewith at that value. (R. 219).

By paragraph 15 of the findings (R. 216) the Court found:

> "That the ordinary commission allowed to the Administratrix by law amounts to the sum of $1,736.56, and none of such commission has been paid. That the Administratrix has rendered services herein, has fulfilled her duty as such, has made neither improper nor excessive expenditures of the estate's money, and has timely performed all services herein with due dilligence. That said sum is reasonable."

By paragraph 19 of the findings (R 216-217) the Court found:

> "That in the lifetime of decedent, decedent formed Ora Bundy & Co., a partnership, giving to his widow, son and daughter, shares therein. Such company conducted a gravel pit operation at Brigham City, Utah. Deceased also had purchased a large stock of war surplus goods and was disposing of them at the time of his death under an oral agreement with one, Robert Holmes. That just prior to the death of deceased, the gravel pit was sold, and much of the equipment; some of the real estate was still retained.

There was a large number of outstanding accounts. The affairs of the company and the estate were so intermingled that it appeared to be to the best interest of all that the affairs of both be settled in one operation, so far as this could be done. Upon the appointment of the Administratrix, she immediately took over and attempted to collect accounts, dispose of the remaining equipment and property and the war surplus merchandise that was on hand. She found that there was no written record as to the agreement between decedent and Robert Holmes, that the accounts had been poorly kept, and after the death of decedent, through the connivance of Robert Holmes and objector John A. Bundy, what records there were, were destroyed or otherwise hidden. The objector, John A. Bundy, not only refused to cooperate with the Administratrir in settling the affairs of the estate and the company, but rather connived in most every way possible in hindering the settlement of the affairs of the estate and company. According to his own testimony, he converted funds, equipment, and money received from the accounts, to his own use. The exact amount of his conversions has never been, and perhaps never will, be found out. Said objector further neglected and refused to make accountings to the estate and company of his defalcations.

Because of his defalcations and general conduct, the Court finds the objector, John A. Bundy, to be without standing in Court and not in a position to challenge the acts of the Administratrix.

The Court further finds that the objector, John A. Bundy, has received all the property from the estate that is due him, and perhaps more than he is actually entitled to, by reason of his obstructing policies and his conversions.

> The objector, Dora B. Goddard, and her husband, a certified public accountant, live in University City, Missouri; they have been of little or no assistance to the Administratrix in the conduct of the affairs and closing of the estate."

The decree (R. 220-225) was entered in accordance with the findings and conclusions and cut Jack Bundy off from any participation in the balance of the assets in his father's estate, approved the accounting as rendered and distributed the balance of money and other assets to Mrs. Bundy and Dora Goddard in equal shares, charging Mrs. Bundy only $100.00 for the 10 foot strip of real property in question.

On April 26, 1950, while counsel for Respondent was preparing the proposed findings and decree he advised counsel for Appellants that it was his intention to charge Mrs. Bundy only $100.00 for the land in question. Counsel for Appellants then informed him that he desired to present to the court at suitable times representation that said land should be charged at a value of $450.00 in accordance with a proposal for distribution (Administrator's Exhibit B) introduced in evidence at the trial and if necessary, to have the case reopened in order to establish the true value of the property at the time of the distribution. (R 235 and 244-245). Because there is an unfortunate divergence in the recollection of counsel for Respondent and the writer we do not press some other matters included in the papers filed in the court below. However, counsel for Appellants relied upon the rule requiring the Clerk of the Court to mail a copy of the findings and conclusions and judgment entered immediately upon their entry and took no action at that time in the matter, expecting to make suitable

representations to the Court in presence of counsel at such time as the Court proposed to settle its findings or move to amend the findings and judgment in accordance with the Rules of Civil Procedure within ten days after the entry. During all of the time counsel for Appellants was under great business pressure and engaged in arranging the affairs of his office to leave the City and State for the trial of a lawsuit of great importance then pending in the Federal Court of the District of Idaho. On the 6th of May, 1950, he was compelled to leave Ogden for Pocatello for preparation and trial of the lawsuit and was compelled to remain at Pocatello until Thursday, May 11, 1950, when he learned for the first time in a conversation with Mr. Holther that the findings, conclusions and decree had been signed and that no copies had been mailed by the Clerk as required by the rules. On that same evening counsel for Appellants was compelled again to leave Ogden for the trial of the lawsuit in Pocatello and was compelled to be continuously absent until the evening of May 20, 1950, whereupon he proceeded diligently to prepare a motion for an order relieving Appellants of their default upon the ground above summarized and for leave to file motions for amendment of the findings and decree and Motion for New Trial. This motion with supporting affidavit and the proposed motions for amendment and for new trial were filed and tendered to the Court on May 22, 1950. (R 227-237).

Respondent, through her counsel, filed an answer to the motion for relief with supporting affidavit. (R 238-246). The matter was heard on May 29, 1950, and the Court entered its minute order denying the motion for

relief and for leave to file motion for amendment. Thereupon and on the same day and within one month from the date of the entry of the original decree the principle appeal herein was perfected by the filing of the Notice of Appeal with the cost bond as required by the Rules of Procedure. The formal order for motion for relief was not made and entered until June 13, 1950. (R 272). On the 15th of June, 1950, Appellants duly filed a supplemental notice of appeal to bring up before the Court for review the order of the Court denying the Appellants' motion for an order relieving default and for leave to file their motions for amendment of findings and decree and for new trial. (R 275).

Notwithstanding the initiation of this appeal, no stay bond having been filed, the Respondent proceeded to make distribution in accordance with the decree of the Court from which the appeal was taken. Dora Goddard declined to accept the one-half share of the residue because the decree having been appealed from was not final and she felt some adjustment was necessary. The Respondent then paid Dora's half to the Clerk of the Court to be held subject to the Court's order and paid to herself her one-half as the surviving widow under the decree of distribution. Respondent then, over Appellants' objections, procured her final discharge as as administratrix. (R 250-275).

In conclusion of the statement of facts it is perhaps interesting to know that the Appellants' step-mother, who was never gainfully employed after her marriage and who before decedent's death had spent the $3,000.00 received by inheritance from her father, found herself at the conclusion of her administration of the estate for

the benefit of her stepchildren, with separate and survivorship property worth approximately $40,000.00, with widow's allowance paid over a period of three years in the sum of $10,600.00, a partial distribution some fifteen months after her husband's death in the sum of $10,000.-00, an administratrix fee in excess of $1,700.00 (R 221), a final cash distribution in excess of $4,000.00 (R 222), and United States Bonds of a maturity value in excess of $2,800.00, together with land in Beaver County appraised in excess of $300.00, *a total of* $69,400.00. In addition to this Mrs. Bundy had some miscellaneous stocks, an interest of 43½% in the remaining assets of Ora Bundy & Co., together with all of the furniture which was in the home occupied by decedent and herself at the time of his death and substantially all of the furniture which was in the home occupied by Jack at the time of his Father's death, as hereinbefore outlined.

On the other hand the stepdaughter, Dora, suffered serious illness and needed money for medical expenses and had received a $10,000.00 partial distribution, slightly less than $4,500.00 on final distribution (R 222), United States Savings Bonds of a maturity value of $2,800.00, 37½% interest in Ora Bundy & Co., some miscellaneous stocks equal to those distributed to Mrs. Bundy and a large group of stocks and notes of no value. (R 223-224). She was also at death beneficiary upon five $100.00 United States E Bonds worth approximately $400.00 It was not until the trial that her right to her own mother's piano was finally conceded to her. She had, of course, also received 20% of the distribution from Ora Bundy & Co., which, as we compute it, had amounted to approximately $7,150.00 at the date of the

trial. She thus realized out of her father's assets *the approximate value of* $24,850.00 Finally Jack (who worked with and for his father and who is undoubtedly unfortunate in many respects, received from the partnership 20% computed at approximately $7,150.00, a partial distribution of $10,000.00, a truck of the agreed value of $1,100.00 (R 126) and $1,500.00 as an additional partial distribution (R 168-169) and, by right of survivorship, two $100.00 maturity value E Bonds worth approximately $160.00, *a total of approximately* $19,-910.00. From the work sheet proposed by Mr. Holther on April 30, 1949 (Adm. Exhibit B) after making an adjustment for the $1,500.00 partial distribution of June 1, 1949, it appears that the decree of the court deprives him of some $2,000.00 in cash plus an interest in the remaining assets of Ora Bundy & Co., upon the sole justification of gossip of unknown persons overheard by the Judge and the suspicions of his stepmother.

In concluding this statement of facts we wish to say that it has been recognized that with regard to Jack's effort to set aside this decree of disinheritance his interests conflict with those of his sister Dora Goddard. A full disclosure of this circumstance has been made to Mrs. Goddard and she has advised counsel for Appellants that she desires them to represent Jack in his efforts to recover the balance of his patrimony and that she does not desire to deprive him of it.

STATEMENT OF POINTS RELIED UPON

1. All furniture paid for by the Decedent and not proven to have been the subject of executed intervivos gifts to Respondent, is the property of the estate, and the

Court erred in finding it was joint property, and in failing to require Respondent to inventory and account for the same.

2. The evidence does not support the Court's finding that John A. Bundy has received all of the property from the estate that is due him, and he is entitled to have distributed to him the balance of his one-third share as proposed in the petition for distribution.

3. Upon the accounting of the administratrix she should be refused credit for the sum of $10,600 paid herself as family allowance during 3 years of administration, she having adequate facilities at all times for her support.

A. The failure of the Administratrix to make a full and fair disclosure of her separate property and resources to the heirs and the Court in connection with the application for family allowance, and her profiting thereby at Appellants' expense, is extrinsic fraud requiring that the Order for Family Allowance be set aside.

B. The Petition for Family Allowance was insufficient to invoke the power of the court to grant a family allowance and the order is void.

C. The order of the Court striking from Appellants' Objections their allegations concerning the derelictions and fraud of the Administratrix is in error and should be reversed and disregarded.

D. Under Section 102-8-1 U. C. A., 1943, a sound discretion, and a balancing of the equities of the parties, requires that Respondent be allowed no family allowance.

4. Respondent Administratrix, unnecessarily and improperly, and to her own personal profit and the disadvantage of the heirs, delayed closing the estate beyond August 27, 1947, and having received on that date a distribution of $10,000.00 cash, in any event should not be allowed credit for any family allowance thereafter accruing.

5. Respondent Administratrix should not be allowed compensation, and should be compelled to refund the same,

A. Because she, being disqualified, waived compensation when the heirs consented that she act, and

B. Because by her improper adminstration, especially in regard to her failure to account for estate property, and her improper payments of family allowance, and her resistence to the proper efforts of the heirs to obtain an adjustment, she has forfeited her right to compensation.

6. The 10 foot strip of real property distributed to Respondent should be charged to her at the value of $450.00 proposed by her counsel.

7. The Court erred in denying Appellants' motion for leave to file out of time their motion to amend the findings and decree and their motion for a new trial.

ARGUMENT

Point One: Furniture, the property of the estate, has not been, but should be inventoried and accounted for by Respondent Administratrix.

It was conceded at the trial that furniture from the Brigham City home occupied by Decedent's son Jack was either property of the estate or Jack's by virtue of a gift from his father. However, Respondent sold some of it for $15.00, accounting to the estate for the proceeds, *and the balance she appropriated to her own use* and had in her home at the time of the trial, by her own statement. On sympathetic and helpful leading by the Court, she said she intended to have it distributed to her and charged against her share. (Tr. 77-80). This, however, was not done. It has never been inventoried or appraised, and in the findings and decree prepared by her counsel no mention is made thereof. She still has it.

The Ogden home was occupied by Decedent and his wife, the Respondent, as a family dwelling, from the time it was built in 1939 until his death in 1946. Most of the furniture therein was purchased new to furnish the new home, although Dora Goddard's uncontradicted testimony was that there were some valuable items which her father had owned prior to his marriage to her stepmother. Respondent testified that she purchased a few items (only two or three were identified) out of her separate patrimony of $3000.00. Dora conceded that a chair and some dishes were gifts to Respondent. But the great bulk of the furnishings were obviously purchased and paid for by the Decedent in the course of the maintenance of his home as head of the family. Respondent was never gainfully employed.

On these facts in evidence (the Court having instructed Mrs. Bundy not to answer Counsel's questions designed to identify which furniture was Decedent's and which the Respondent's) the Court below found that the

furnishings and furniture "were purchased, *in part,* by Lovina R. Bundy with her separate funds . . . and *were all joint property,* and as such did not, and does not, constitute any part of the property of this estate" and were therefore properly omitted from the inventory.

The Court refused Appellants' offer of the attempted will (Exh. 1.) in which Decedent assumed the right, an incident of ownership, to dispose of the furnishings in his home. It is submitted that this was error and that it should have been admitted as a declaration of ownership bearing on his intent as to taking title when he purchased and paid for the property, under the doctrine announced in

Stanley v. Stanley
97 Utah 520,
94 P2d 465, and

Mowrer v. Mowrer
64 Utah 260,
228 P. 911.

These cases involved title transactions respecting real property, but it is submitted the principle is equally applicable to personality. In the Stanley case, one of the facts held properly considered by the court was that decedent there disposed of the property in question by will.

There do not appear to be many cases involving questions of title to personality as between husband and wife under facts like these. However, the Pennsylvania case of

Kauffman v. Stenger
30 Atl. 2d 239

seems to be in point.

In that case certain personal property situate upon the land occupied by a husband and wife as their home was levied upon under a writ of execution directed against the property of the husband alone. The husband and wife both appeared and claimed that the property was owned by them as tenants by the entirety and hence not subject to levy under the execution. It was held that the evidence was insufficient to show that the wife had any interest in the property. The court said:

> "In general where husband and wife live together in the same house and on the same land, the ownership of personal property, though in the possession of both, is presumed to be in the husband and not in the wife. Rhodes v. Gordon 38 Pa. 277. . . . A wife claiming property acquired during coverture against her husband's creditors is required to substantiate her claim by proof sufficient to repel all adverse presumptions. How the property was acquired, if by gift or descent, or otherwise, *or whose money paid for it,* determines the issue. Heiges v. Pifer, 224 Pa. 628, 73 A. 950; Walker v. Reamy, 36 Pa. 410. Under the circumstances the same rule applies to the present case and nothing short of 'clear, full and satisfactory' proof can establish title by entireties . . . There is no evidence as to how the stock which produced the increase, the subject of the (execution) sale in this case was acquired and in the absence of sufficient evidence the court was bound to conclude that the burden of proof of title by the entireties was not met."

See also
Upchurch v. Upchurch
(Georgia)
45 SE 2nd 855.

If clear, full and satisfactory proof is required of wife to establish her title or a joint title with her husband as against the creditors of her husband, it would certainly seem that where, as here, a widow and stepmother claims property against the estate of her deceased husband which she represents as administratrix for the benefit of her stepchildren, who have reposed trust and confidence in her, the proof by which she must establish her adverse personal claim against herself as administratrix should be even more clear, full and satisfactory. As held in the case of Rice v. Rice.....Utah ....., 212 Pac. 2d 685, an administratrix is a trustee in the broadest sense and is held to the same high and strict accountability of a trustee. For the Court to permit, as the trial court did, this administratrix-trustee to appropriate to herself property paid for by her intestate without any evidence whatsoever to justify her personal claim of ownership, seems to the writer to outrage all of the concepts of equity. Certainly the only evidence as to the ownership of the furniture in question is the evidence to the effect that it was the Decedent's money which paid for it. We submit that the finding of the Court is erroneous and should be reversed and that the decree settling Respondent's final account should be vacated and set aside and the cause remanded with instructions to require the Respondent personally and as administratrix to inventory and account for all of the Decedent's furniture which has been appropriated by her personally.

Point Two: The evidence does not support the Trial Court's finding that John A. Bundy has received all his share of the property of the estate, and he is entitled to a further distribution.

Upon the death of his father, John A. Bundy by operation of law immediately acquired a one-third vested interest in the estate, subject only to administration under the Probate Code. The reports and accounts of the Administratrix affirmatively show that he has not had distributed to him the full amount of his property.

The only possible basis for the trial court's finding and decree that he has had his share is contained in his testimony under citation on August 8, 1949. *But it there appears affirmatively and without contradiction that within two months of his father's death Jack accounted for the partnership money and property* that had come into his hands, an account was stated *and he paid the balance due the partnership by authorizing a charge to his account upon the liquidation.* And there is absolutely no evidence that he ever took, or had, or received any other partnership or estate property. The only thing left as a basis for this act of disinheritance is the passion and prejudice of the trial court, apparently evoked by the malicious gossip of unknown persons which was overheard by the trial court alone.

In this connection it is interesting to note that this was done on the trial court's own motion. Nowhere in Respondent's Petition for final Distribution does she allege any facts as a basis for the court's finding number 19, or intimate in any way that she thought Jack had had his share, or that he should be disinherited because of his "defalcations." On the contrary she alleged (R. 158-159) that the residue should be distributed one-third to each of the three heirs, including Jack.

And at the trial, it will be remembered, counsel for Respondent in effect stated that he had no evidence to present to prove that Jack was further indebted to the partnership or the estate.

Under these circumstances it is clear not only that this action of the Court is not only against the weight of the evidence—it is absolutely unsupported by any competent evidence.

It is submitted therefore that the finding and decree of the trial court should be reversed on this issue, and this court should direct a finding, conclusion and decree distributing to John A. Bundy one-third of the residue of the estate subject only to those advancements to him which are shown by the Administratrix's accounts on file herein, and compelling Respondent to disgorge that portion of his share which she has distributed and paid to herself in accordance with the erroneous decree.

Point 3. *The Administratrix should be refused credit upon her accounting for the sum of* $10,600.00 *paid herself as family allowance during three years of administration, she having adequate facilities at all times for her support.*

At the outset of a consideration of this proposition we are met by the contention that the Appellants are foreclosed by the order for family allowance made on Respondent's petition on May 12, 1947 and not thereafter modified or set aside during the administration and not formally attacked until the filing of Appellants' objections herein. To this the Appellants have two answers: First, the failure of the Respondent under the circumstances to make a full and fair disclosure of her

separate property and resources in connection with the application is extrinsic fraud requiring that the order for family allowance be set aside, and second, under the Utah Statute (Section 102-8-1 U.C.A. 1943) relating to family allowance, the petition for family allowance did not state facts sufficient to constitute grounds for the issuance of the order and hence the jurisdiction of the court was not properly invoked for the making of the order for family allowance and the order is subject to attack here.

The allegations of the Appellants' objections and petition of course constitute a direct attack upon the order.

In connection with the first point it is to be observed that the Respondent here is in a most delicate position and one in which she represents conflicting interests. In the first place she was the stepmother of the other two heirs. It is apparent from the record that at least so far as Dora Goddard is concerned she at once reposed in her stepmother trust and confidence and felt the natural hesitation of a stepchild to question the motives and the action of her stepmother. Dora lived in Missouri throughout the administration of the estate. Her suggestions for the retention of counsel for the estate had been rejected at a meeting held immediately following Decedent's funeral. This would naturally enhance her diffidence. Jack Bundy lived out of town all the time and it would appear from the record that he was not one with any great capacity for business detail or the legal niceties of probate and trustee proceedings. The Respondent here upon her appointment

as administratrix undertook a trust in which she represented several conflicting interests. First and most obvious she was a surviving partner in Decedent's partnership, and under the circumstances it was apparent that she would be the liquidating partner and as such she would have to account to herself as administratrix and as administratrix would have to give herself quittance as liquidating partner. This situation is so obviously fraught with difficulty and possibilities for loss to the beneficiaries of the trust that the law (Section 102-4-2 (5) U. C. A. 1943) disqualified her to act as administratrix. Nevertheless, she sought for and procured the issuance of letters to herself, and it does not appear that she made any disclosure to the court that she was disqualified to act.

When she took her oath as administratrix she assumed the duty of properly preserving the assets of the estate for the benefit of the heirs, including Appellants, to the end that the largest possible final distribution might be made to them. As a surviving widow of the Decedent applying for family allowance, her own personal interests would impel her to obtain the largest possible family allowance for her own use (her stepchildren did not participate therein) and so to arrange things that the family allowance would continue for the longest possible time. The more family allowance and the longer it continued the bigger the proportion of the assets of the Decedent's estate would be paid to her. In other words, for every $3.00 family allowance she as administratrix could pay to herself as widow, each of the stepchildren would receive $1.00 less out of the assets of the estate. From the point of view of the heirs the payment of family allowance was a depletion of the

estate. Hence, her interests as widow in this regard were diametrically opposed to the interests of the other two heirs and to her interests as the administratrix whose duty it was to preserve the estate for the heirs. Thus when she assumed the office of administratrix she did so under conditions such that her personal interests were diametrically opposed to her official duties and obligations. Nevertheless, she did not hesitate.

It is apparent everywhere from the record that whenever her official duties and her personal interests collided her official duties came off second best. Indeed it appears from the record that she had no scruples about paying herself the family allowance even without consulting the Court about it, for on December 30, 1946, more than four months *before the Court authorized it,* she paid herself $1500.00 as *family allowance.* (R. 081). It is also interesting to note that she apparently did not feel the need for asking the Court for a family allowance until some ten months after Decedent's death and about six weeks before she received from the partnership a $7,200.00 liquidating dividend less a $2,000.00 advance thereon which had been made sometime theretofore. (See Objectors' Exhibit 7 as to partnership dividend.) All this time she was living in the family home, paid for by the Decedent.

It will be recalled that she had acquired during her marriage with the Decedent, and independently of Decedent's estate some $40,000.00 worth of assets, including some cash and a very substantial amount of United States Bonds which are of course substantially the equivalent of cash.

Against this factual background let us consider somewhat the Utah Statute on family allowance and its legislative and judicial history. The present statute, Section 102-8-1 U. C. A. 1943 reads as follows:

> "When a person dies leaving a surviving wife, husband or minor children, they shall be entitled to remain in possession of the homestead and to the use of the property exempt from execution until otherwise directed by the court; *and during administration shall receive such allowance out of the estate as the court may deem necessary and reasonable for their support.* Such allowance may date from the death of the decedent, but in case of insolvent estate shall not continue for longer than one year, and must be paid in preference to all other charges, except expenses of last sickness and funeral expenses of the decedent and costs and charges of administration. *The court may, in its discretion exclude from such family allowance, except homestead rights, any person who may have a separate property or income.*" (Italics supplied).

The last italicized sentence of the statute was added by legislative amendment in 1915 under circumstances which will hereafter appear.

The Statute (without the final sentence) first came before the Supreme Court of Utah for interpretation in 1902 in the case of

> In re Parks Estate
> (Hilton v. Stewart)
> 27 Utah 489, 76 Pac. 650.

It was there held that where a husband and wife had for many years before his death lived apart under an agreement and she was not dependent on him for support, she

was not entitled to a family allowance on his death, as the statute granting the allowance was intended to make immediate provision for a family when the head is removed by death.

The Statute, still without the final sentence, next came before the Supreme Court in 1904 in the case of

In re Pugsley's Estate
76 Pac. 560.
27 Utah 489

The Supreme Court then held, without reference to its earlier decision, that even though a portion of the real estate of a decedent is set aside to the widow as her share of the estate she has an absolute right to the allowance, the amount being in the court's discretion. Although the duration of the allowance was not involved in the case the court observed that the period for which an allowance must be granted is "during administration" of the estate. The court also considered the amount ($80.00 per month out of a $50,000.00 estate) of the allowance involved there and held it not excessive under the circumstances and quoted with approval a text writer to the effect that:

> "In determining the amount necessary for such purpose regard may be had to the state of the health, age and habits of the widow, the number and age of the children immediately dependent upon her, as well as the value of the estate, and of her dower and distributive share therein. It may also be considered whether or not she is accustomed to hard labor, and thus enabled to support herself, or if, by reason of all health or other circumstances she is unable to do so."

Against that legal background the Legislature of Utah in 1915 felt it desirable to add to the Statute there considered the sentence which now concludes the section, to-wit:

> "The court may, in its discretion, exclude from such family allowance, except homestead rights, any person who may have a separate property *or* income."

It is obvious that between 1904 and 1915 the workings of the rule announced in the Pugsley case had been found to be unjust and inequitable to heirs other than the widow, as in the case now at the Bar of the court, and that the Legislature added this sentence to overcome the hard and fast rule of the Pugsley case. It is clear that the Pugsley case is no longer the law except as to the factors to be included in determining the amount of the allowance.

It is also abundantly clear that under the law now existing, including the Statute and the surviving portion of the Pugsley case, the amount of the separate property and of the separate income of a person applying for family allowance is essential and material to a determination of the amount of the family allowance to be ordered by the court. Without this information it is impossible for the court to exercise a sound discretion, or for the administrator to know whether or not his duty would compel him to oppose the granting of a family allowance.

To illustrate this point let us suppose two cases in both of which the children of the decedent have reached their majority. In the first case suppose the widow applying has a separate estate invested in United States

interest paying bonds bringing her monthly income of $1,000.00 while the estate amounts to no more than $10,000.00 and the children of decedent are both ill and unable to work. In the second case suppose a widow who is ill and without any separate property or income and the estate amounts to $1,000,000.00 in cash and interest bearing bonds while the children of the decedent have reached their majority and are all well and self-supporting. It is apparent that no court could exercise a proper discretion in fixing the amount of the allowance without every one of these facts before him in each case.

It is further apparent that the misrepresentation of any one of these facts, such as the separate property and income of the applicant, or the failure to report such a fact when under a duty of full and fair disclosure, is an extrinsic fraud rendering a decree obtained thereby void at the election of any interested party.

That is the law in Utah applicable to the personal representative in a decedent's estate. See

Rice v. Rice ,
..... Utah .....
212 Pac. 2nd 685,

where this court very recently held that an executor is a trustee owing an obligation to his legatees and devisees and to the court and that an executrix who in distributing property improperly omitted land on which building and facilities used by a brother were located and omitted water rights as well was guilty of extrinsic fraud justifying intervention of a court of equity. This court there remedied the situation upon a petition filed, as here, in the probate proceedings. In that case this court quotes with approval from the case of

as follows:

> "Initially we desire to make it plain that an executor or administrator occupies a postion of the highest trust and confidence, not only to the creditors and beneficiaries of an estate but to the Court as well, and so he is required to act in entire good faith. * * * Accordingly an executor is a trustee in the broadest sense and is held to the same high and strict accountability of a trustee. * * *
>
> "It is clear from the letters that appellant was guilty of extrinsic fraud and that the trial court was justified in so finding. But quite apart from the extrinsic fraud, the trial court was justified in vacating the order and decree *on the ground that the executor had not made to the court a full and fair disclosure of the rights of respondent.* * * * (Italics supplied.)
>
> "Here the executor in his capacity of residuary legatee was unjustly enriched by the construction placed by the court upon the will upon his ex parte showing, to the improverishment of the legatee entitled to her legacy. It was a fraud of the most serious nature. It involved not only a breach of fiduciary duty to the respondent but a breach of duty to the court."

It is submitted that these cases are exactly in point. Here the widow and the administratrix are one and the interests of the two positions are conflicting. Here the administratrix was under a duty to protect the assets of the estate and that duty involved a duty to make a full and fair disclosure to the court of all of her separately owned property and income in connection of her

application for a family allowance. She made no such full and fair disclosure and at the time she applied for an order for famiy allowance neither reported her separate property nor filed the inventory showing the value of the estate. Without presenting any testimony or evidence and upon allegations which were mere conclusions she obtained an order of the court pursuant to which she has profited at the expense of the estate to the extent of $10,600.00.

Non-disclosure is a failure to reveal facts. It may exist where there is neither representation nor concealment. A person who stands in a fiduciary or confidential relationship to another party has a duty to reveal all relevant facts.

Restatement of the Law,
Restitution, Section 8,
Comment B, Page 33,

citing

Restatement of Agency
Section 390, and
Restatement of Trusts
Section 170 (2).

And where a relationship of trust and confidence exists between the parties there is a duty to disclose all material facts, and failure to do so constitutes fraud. 37 CJS 247.

Morever when a person in a fiduciary relation to another acquires property, and acquisition or retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other.

Restatement of Restitution

Section 190, Page 780.

We submit it is also the law that where in the absence of consent by a beneficiary a constructive trust would arise, the consent of the beneficiary or his failure to protest does not preclude him from enforcing a constructive trust if the beneficiary did not know his rights and the material facts which the fiduciary knew or should have known, or if the *transaction was not fair and reasonable.*

Restatement of Restitution
Section 191.

And a transaction between the fiduciary and the beneficiary in which the fiduciary is dealing on his own account in regard to a matter within the scope of the relation, can be set aside if the transaction is not fair and reasonable.

Restatement of Restitution
Section 191, Comment on
Clause (d), Paragraph e.

And in 2 Bancroft Probate Practice, Page 648, it is said:

> "The relations of both executors and administrators to the estate and to those theyrepresent are confidential and fiduciary, and they act in a high fiduciary character in their dealing with the estate and its funds. They are required to exercise the utmost good faith in dealing with heirs or devisees or others whom they purport to represent. . . .
>
> "It is fraud in law for the representative to take, for his own benefit, a position in which his interest will conflict with his duties."

Because of the Respondent's fiduciary relationship she owed a duty of full and frank disclosure to the Court and to Appellants. Her failure to do so is constructive fraud. It exists irrespective of moral guilt. Her breach of legal and equitable duty is declared fraudulent by the law "because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud."

37 C.J.S. 211-212.

It is submitted that because of the fraud inherent in her taking a position where her duties and interests conflict, in her failure to disclose, and in her profiting thereby, the order for family allowance is void and she can take no comfort therein. It follows that she has paid herself $10,600.00 of the estate's money without any authority and should not be allowed credit therefor.

There is an additional reason why the Respondent cannot hide her profit at the estate's expense behind the order granting family allowance. The Statute provides for "such allowance . . . as the Court may deem necessary . . ."

It is to be observed that there is in Respondent's petition for an allowance no allegation whatsoever of any facts showing the allowance to be necessary. There is not even an allegation of the legal conclusion that the requested allowance was necessary. Nor is there any allegation concerning the value of the estate, nor any allegation or report of the petitioner's separate property and income which would have stirred the court's

discretion in opposition to the Petition. The inventory had not been filed. No evidence was introduced at the hearing; the court merely found the allegations of the verified petition were true.

We submit, that the petition and the record supporting it are insufficient to invoke the exercise of the trial court's jurisdiction to grant a family allowance and the order therefor is void.

As was held by this Court in the case

Stockyards National Bank
v. Bragg
67 Utah 60,
245 P. 966,

while jurisdictional facts need not be recited in an order to properly invest the court with jurisdiction of the subject matter, they must appear somewhere in the record that describes the matter for the court's adjudication and is the foundation for the order. A judgment which is beyond or not supported by pleadings must fall, and a judgment founded on a record showing that the fundamental law was disregarded in its establishment, is subject to direct and collateral attack, and will sua sponte be noticed by courts and acted upon by them.

See also

Richins v. Hadlock
80 Utah 265,
15 P. 2nd 285, 291,

to the effect that "if judical direction is essential, it is just as essential that a proper *and sufficient* petition or initial pleading of some kind be filed to invoke judicial action." (Italics supplied.)

In the criminal case of

State v. Durfee
77 Utah 12
290 P. 962,

it was held that if facts alleged do not constitute an offense, the defect may be raised even after veridict, and the infirmity may be raised at any time, either before or after judgment, and in a direct proceeding "may sua sponte be noticed and acted upon by the appellate tribunal."

See also

Worley v. Peterson
80 Utah 27
12 P. 2nd 579, 587.

30 Am. Jur. "Judgements," Section 148.

Appellants' Objections and Petition, being a direct application in the same proceeding and to the same court that considered the petition and granted the order, and being based upon fraud in law and the insufficiency of the supporting record, constitute a direct attack upon the order.

Intermill v. Nash
94 Utah 271,
75 Pac. 2nd 157.

This case, morever, comes within the express exception of Section 102-1-8, U.C.A., 1943, providing that an erroneous or defective statement of a jurisdictional fact "is available only on *direct application to the same court,* or on appeal."

And see also the recent case of

In re Linford's Estate,
Linford v. Linford

..... Utah .....
207 P. 2nd 1033,

where this court held that an order settling a final account and decree of summary distribution entered after due notice and hearing, did not protect an administratrix against a petition in the same proceeding seeking to compel her to file a true and correct inventory and have the property reappraised and distributed as provided by law. The court said:

> "This is not an action against the administratrix, but rather a petition directing the Court's attention to certain alleged fraudulent and improper acts on the part of the administratrix, and requesting that the Court require her to properly administer the estate."

We submit that this case is directly in point here. Withdrawing funds from the estate for the personal advantage of the administratrix is precisely the same as withholding funds or property which should have been included. It is also direct authority for the point that the approval of Respondent's first account herein does not afford her any protection against this proceeding to compel her properly to account for the funds and property of the estate.

We submit that the actions of the Respondent here are not hidden from the eyes of the Court by the orders upon which she relies, but are legally and equitably open for inspecton and correction in this proceeding.

If it be contended that some of the facts hereinbefore argued are not properly before the court because

the allegations thereof were by the court stricken from Appellants' Objections, the sufficient answer is that the order (if a minute order is effective) striking such allegations was error, and should be reversed and disregarded. In the first place, the authorities above cited establish the relevance and materiality of these facts and the allegations thereof. In the second place, Respondent's Motion to Strike was directed only to the entire pleading, not to the parts thereof, and was made only upon the ground that the pleading was filed late without leave of court. The Objections, however, were filed before any default was claimed or proceedings taken, and, under the Code of Civil Procedure then in effect, the time to plead was not shut off, but was in effect thereby extended.

Sanders v. Milford Auto Co.
62 Utah 110,
218 P. 126.

The Court's order striking a part only of the Objections was obviously on its own motion, as Respondent made no such motion. And where a pleading is entirely material, *or only in part immatrial,* it is secure against a motion to strike the whole. Where there is relevant matter (which is apparently conceded here) included within a portion of the pleading to which a motion to strike is directed, the motion should be denied under the Code.

1 Bancroft's Code Pleading 897
1 Bancroft's Code Pleading, etc.,
10 year Supplement, 342-3.

It would seem that by her fraud Respondent may well have forfeited the right to a family allowance under these circumstances. But even if it were to be conceded that the court, upon the making of a full and fair disclosure would then have the right to award her a reasonable family allowance to date from the death of the decedent, as the court below attempted to do by its finding that it would have approved the allowance even had the disclosure made at the trial been made previously, still we submit that under all of the facts and circumstances in this case it was and would be an abuse of the trial court's discretion under the statute to allow the widow a family allowance to the extent of $10,600.00, two-thirds of which must come from the share of her stepchildren, or to any extent in the light of the separate property owned by her or acquired by her by virtue of the decedent's death.

Here we have a widow almost in the prime of life, with no showing of any disability, who has become independently wealthy through her marriage to the father of her stepchildren. In adition to her indepdent wealth, amounting to some $40,000.00, she will inherit equally with each of her two stepchildren. There has been no showing whatsoever of any actual need of a family allowance during any reasonable adminstration of the estate. On the other hand the undisputed evidence shows that the appellant Dora Goddard has been ill and under very heavy medical expense and needs the money. When all of the facts and equities are considered, we submit that it was an abuse of discretion to allow this stepmother so to profit at the expense of her stepchildren whose interests she, as a trustee, was duty bound to protect.

Point 4. Respondent Administratrix, unnecesarily and improperly, and to her own personal profit and the the disadvantage of the heirs, delayed closing the estate beyond August 27, 1947, and, having received on that date a distribution of $10,000.00 *cash, in any event should not be allowed credit for any family allowance thereafter accruing.*

Whatever may have been the necessity of a family allowance for Respondent prior to August 27, 1947, it disappeared on that date when she received a distribution of $10,000.00. It is Appellants' position that having received that distribution, her duty to the estate, and to the heirs, required that she call the matter of the family allowance to the court's attention with a view to having her family allowance then discontinued. She did not do so and here again Appellants' contend that she was guilty of constructive fraud and should not be permitted to retain the fruits thereof.

It is true that the statute says that a widow shall receive such allowance as the Court may deem necessary and reasonable "during administration." Under the statute as amended it was within the court's discretion to exclude the widow entirely because of her separate property, even from the first, and certainly it would seem to be the court's duty to do so when the bulk of the estate was distributed after some fourteen months of administration. The statute does *not* require a family allowance "during *the entire period of* administration." It only requires that "during administration" that allowance which is *necessary* and reasonable shall be granted. Certainly the requirement that the allowance

be limited to that which is deemed necessary and reasonable, limits and modifies the phrases "during administration", so that if the court in exercise of its sound discretion should deem it necessary and reasonable to grant an allowance for six months of the period of administration but unnecessary and unreasonable to pay a family allowance thereafter, by reason of the separate property of the recipient, the spirit and letter of the statute is followed with respect to the duration of the allowance. In several of our sister states the statute is very similar, providing that the court must make "such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances during the progress of the settlement of the estate." It would seem that the phrase "during the progress of the settlement of the estate" is substantially the equivalent of the Utah phrasing "during administration." Under such a statute it has been held in California that it is proper to discontinue the allowance to the widow after making changes in the estate by establishing a probate homestead.

In re Taylor's Estate
55 Pac. 2nd 537.

Morever, since the policy of the law is speedy settlement and distribution, the phrase "during the progress of the stttlement of the estate" is construed to mean "during the time reasonable necessary" for settling and closing the estate. An order for family allowance therefore must be presumed to be satisfied when the time arrives at which the estate may be settled; else the administrators may delay action until the whole

estate is consumed and nothing left to those who are entitled to a distributive share of its assets. As was observed in the Montana case of

In re Dougherty's Estate
86 Pac. 38:

> "We do not think the law, though it is exceedingly regardful of widows and children deprived as they are of their natural supporter, completes any absurd result."

Clearly a widow who is also the representative is not entitled indefinitely to prolong the settlement of the estate and thus to continue to receive family allowance.

In re Ekins' Estate (Montana)
208 Pac. 956.

There is, moreover, no merit in the contention that one cannot object to credits claimed in the widow's account as representative for family allowance paid to herself after the expiration for a reasonable time for closing the estate because the objector might have compelled final settlement and distribution at the proper time. Indulgence of others is no excuse for failure of the representative to close the estate at the proper time.

In re Dougherty's Estate, supra.

The last mentioned case seems to have become the leading decision on the subject.

It is probably helpful to note that this court in its very recent decision in the case of

In re Proudfit's Estate
..... Utah .....
219 Pac. 2nd 1076,

has adopted the philosophy that a personal representative having a personal interest to be served thereby cannot as against an interested party with an adverse interest, claim credit for expenses of administration during a prolonged administration, because conceivably if such expenses were sufficiently high and the administration prolonged, the expenses would consume the entire value of the estate. That was a case in which operating expenses of real property were disallowed as deductions for state inheritance tax purpose, but the principle involved is identical.

In the case at Bar certainly no sufficient reason is made to appear why the first account and petition for partial distribution could not have been made a final account and petition for final distribution. The bulk of the assets both in the estate and the partnership had been liquidated and the interest in the partnership could have been distributed in kind, as it was upon the final distribution when made. As a matter of fact, notwithstanding the court's finding, it affirmatively appears from the record that the partnership was liquidated as a separate legal entity from the estate as contemplated and required by law. All claims except estate and inheritance taxes had been paid and it is admitted that there were adequate funds on hand to pay them and all unpaid charges of administration. No one stood to profit by the prolongation of the administration except the administratrix. No excuse has been presented why the inheritance and estate tax returns were not earlier filed and the tax paid.

Our Utah Statute contemplates and requires an expeditious administration. Under the provisions of Section 102-12-4 U. C. A., 1943, it is required that real estate

must be distributed to the heirs at law as soon as the time limited for presentation of claims has expired, unless it satisfactorily appears that the rents are necessary to pay the debts of the decedent. And by Section 102-12-6, U. C. A., 1943; it is provided that when all debts are paid, or sooner if before that time there are sufficient funds in the hands of the administrator for the payment of all debts and the estate is in a condition to be closed the administrator must render his final account and pray for settlement and distribution.

It is submited that in this case the Respondent has violated her statutory duty by prolonging the settlement of the estate beyond the time when she presented her first account and has profited at the expense of the heirs by breach of duty to the extent of two-thirds of the family allowance accruing after the date specified. She should not be permitted to retain the proceeds realized by her breach of trust but should be compelled to disgorge them for the benefit of the heirs, the beneficiaries of her trust, in accordance with the authorities hereinbefore cited.

Point 5. *Respondent Administratrix should not be allowed compensation, and should be compelled to refund that received because she has waived compensation and because by improper and fraudulent administration she has forfeited her right thereto.*

The question of the waiver of the administratrix's compensation was not one of the facts alleged in Appellants' Objection, the matter not having come to counsel's attention until the morning of the trial. However, at the trial of the issues evidence of the waiver was

tendered and received pro forma under objection that it was not within the issues and then striken because no issue on waiver had been pleaded.

It is submited that the amendment should have been allowed under the provisions of Rule 15(b) U. R. C. P. providing as follows:

> "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defence upon the merits."

No claim was made at the trial that the allowance of such evidence would prejudice Respondent. It is, of course, the established policy of the courts in Utah to allow amendments liberally in the interest of justice and with a view of obtaining a final trial of all issues on the merits. If the amendment had been permitted, the evidence would have clearly presented a waiver. It appears that the agreement to serve without compensation was a part of the consideration upon which the Appellants here agreed to waive the statutory disqualication of Respondent to act as administratrix. A promise or agreement made by a proposed personal representative that he will not charge for his services is equivalent to a renunciation of his claim.

In re Machado's Estate (Cal.)

199 Pac. 505.

The Respondent here, having obtained from her stepchildren a waiver of her disqualification in order to secure her appointment, should not now be permitted to renounce her renunciation and to claim compensation contrary to her original promise. To do so, we submit, violates the very essence of the principles of equity and fair dealing.

It is a general rule that an administrator who has been guilty of fraud, willful default, gross negligence or other misconduct in administration by reason of which the estate has suffered detriment, may be deprived of all or part of the compensation to which he would otherwise be entitled. Whether or not the misconduct is such as to warrant the refusal of compensation in any particular case is a matter resting within the discretion of the court. Conduct of a personal representative causing unnecessary expense to the estate, such as fomenting vexatious and unneccessary litigation, may be considered a sufficient cause for disallowance of commissions. (Here the Respondent, in an effort to retain famliy allowance improperly paid to herself and furniture and other property of the estate improperly withheld from the estate, has forced the estate's beneficiaries to appeal to the Supreme Court.) And where a personal representative without just cause delays the settlement of the estate or the distribution of the assets, compensation may be refused. Moreover, where a representative fails to account for assets belonging to the estate he may be denied compensation. See

34 C.J.S., Page 1046 et seq.
and the cases cited.

In connection with this point it is very interesting to observe that substantially all of the communication between the administratrix and the heirs was conducted through the attorney for the estate and apparently he himself worked out all of the schedules for proposed distribution, a function which should normally fall upon an administrator. Although the administratrix may have performed more of the duties of her office than the Appellants were first advised of, she certainly has not personally performed all of them and her counsel has personally carried very much of the load, in addition to the legal maters, for which he was independently paid out of the assets of the estate.

The compensation allowed the Administratrix by the trial court amounts to some $1,700.00, two-thirds of which in effect comes out of the pockets of Appellants. Certainly it does not seem right and just to pay this compensation to the Respondent for services conducted in such a manner that the beneficiaries of those services, toward whom she bears a fiduciary relationship, have been compelled to carry this very expensive litigation to the Supreme Court in order to secure their rights. It is submitted that under all of the facts and circumstances the administratrix should be deprived of her compensation because of her misconduct, or if an order of forefeiture is not made by this court, the order, the order of the trial court refusing Appellants' tendered amendment should be reversed and the cause remanded for the trial of the issue of waiver.

Point 6. *The* 10 *foot strip of real property distributed to Respondent should be charged to her at the value of* $450.00 *proposed by her counsel.*

Throughout the trial of the issues on their objections the Appellants, relying upon the proposal of Respondent's counsel contained in Administratrix's Exhibit B which had been mailed them just shortly before filing their objections, assumed that the Administratrix would carry out the proposal and charge herself $450.00 for the 10 foot strip of land distributed to Respondent and which formed part of the lot on which the family home was situate. It will be recalled that Respondent sold this home as her own property shortly after the distribution for $17,900.00. Certainly it would seem that a valuation of $450.00 is modest enough. While the appraisers in their routine appraisement might have felt the value to the estate was only $100.00 when the land was considered as an isolated 10 foot strip, yet when it became legally attached to the property of the Respondent Administratrix and was an integral part of a valuable home, its value was obviously enhanced.

Nowhere in the record is there any indication that the Respondent at any time intended to repudiate the proposal made by her counsel, which, it must be assumed, was made by her authority. It wasn't until after the trial of the issues of fact was completed that Appellants learned for the first time that the Respondent intended to repudiate her proposal and to charge herself only $100.00 in accordance with the routine court appraisal.

It is submitted that this is such double dealing by a fiduciary that the court should not permit it to stand but should either direct that the administratrix be charged at the proposed sum or remand this cause to the trial court for the taking of evidence as to the fair value to be used for purpose of distribution.

Point 7. The trial court erred in denying Appellants' motion for leave to file out of time and motion to amend findings and decree and their motion for a *new trial.*

Under the circumstances set out in the affidavits on file it is submited that the failure of Appellants' counsel to file their motion for amendment of the judgment with respect to the $450.00 item to be charged to Respondent and their motion for new trial was excusable neglect. That counsel for Appellants in charge of this matter was out of the state on urgent business almost all of the time while the ten day period allowed by Rule 52(b) is not disputed. Neither is it disputed that the Clerk failed to mail the copy of the findings and decree required by Rule 77(d), nor that counsel had relied thereon.

Under these circumstances it is submitted that the exercise of a sound discretion required that Appellants' counsel be relieved of his default and permitted to file Appellants' motions for amendment and new trial out of time under the provisions of Rule 60(b). The Supreme Court of the United States in the case of

Hill v. Hawes
320 U. S. 520

decided in 1943, long before Utah adopted the Federal Rules of Procedure, held that counsel for parties in litigation were entitled to rely upon the mailing of the notice and that where counsel had so relied and notice had not been given it was proper for the court to re-enter a judgment and permit an appeal to be taken within the appeal period after the re-entry of judgment in

order to relieve the party from a judgment or order taken against him through his mistake, inadvertence, surprise or excusable neglect. When Utah adopted the Rules of Procedure it added to Rule 77(d) a final sentence to avoid the effect of this decision *as to the time of appeal only,* but the effect of the decision as to relieving a party of his default as to any other proceeding which must be taken within a fixed time after judgment was allowed to stand. Certainly that is reasonable and proper, for a ten day limitation on filing motion to amend and motion for a new trial is much more stringent than the thirty day limitation on the taking of an appeal. We submit that under the law and on reason the trial court should have relieved Appellants of their counsel's default and permitted the filing of their motions out of time.

Probably any benefit that could have been gained by presenting the motion for new trial can be accorded by this court upon the appeal, so that the question of the presentation of a motion for a new trial to the trial court has become largely moot.

However, we submit that the trial court should be reversed as regards his refusal to receive and file a motion for amendment of the judgment and the cause should be remanded for suitable proceedings looking to the amendment of the judgment to charge the Respondent $450.00 for the strip of land distributed to her as discussed under Point 6 supra.

CONCLUSION

This has been a difficult case to try and to brief. While we regret the length which this brief has assumed the writer does not feel that he could in justice to his clients effectively present the many points involved with less space. The writer only hopes that his efforts will be of some assistance to the court in arriving at a just conclusion.

It is respectively submitted that equity and justice require that the rulings of the trial court upon the various points hereinbefore considered should be reversed and the cause remanded with instructions to the trial court to disallow the Respondent's claimed credit for family allowance and for compensation and to require the Respondent properly to account for all of the funds and property of the estate, including furniture, which have come into her hands and for which she has not accounted and that the trial court should be further directed to charge Respondent $450.00 for the 10 foot strip of land distributed to her.

Very respectfully submitted,

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